

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

— — —

JODI C. HOHMAN, *et al.*,

Plaintiffs,

Case No. 16-11429

vs.

Hon. Matthew F. Leitman

UNITED STATES OF AMERICA,
et al.,

Defendants.

TELEPHONE CONFERENCE

BEFORE THE HONORABLE MATTHEW F. LEITMAN
United States District Judge
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan
Wednesday, January 18, 2017

APPEARANCES:

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Telephone Conference.....

1 Detroit, Michigan

2 Wednesday, January 18, 2017

3 at about 1:32 p.m.

4

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5 (Court and Counsel present.)

6 THE CASE MANAGER: Counsel, the Court calls
7 Case No. 16-11429, Jodi C. Hohman, et al., vs. United States
8 of America Department of Treasury, Internal Revenue Service.

9 Counsel, please state your appearances for the
10 record.

11 MR. SCHWARTZ: Stuart Schwartz and
12 Cynthia Filipovich appearing on behalf of the plaintiffs. We
13 are in the same location on the same line.

14 MR. LEDER: Brent Leder on behalf of the plaintiffs
15 as well.

16 MR. MURPHY: Edward Murphy for the defendants.

17 THE COURT: Good afternoon. Thank you to everybody
18 for joining me, I appreciate your time today.

19 I am doing this call on the record so I would ask a
20 couple of things. First of all, on behalf of the plaintiff
21 can we designate one person to be the spokesperson on the
22 call?

23 MR. SCHWARTZ: Yes, Your Honor, that will be
24 Steward Schwartz speaking now.

25 THE COURT: All right. Thank you. And then I

1 would ask each of you, Mr. Schwartz and Mr. Murphy, please
2 speak slowly and please identify yourselves each time you
3 speak so that we can create a record that is easy to follow
4 and so that we make the court reporter's life easier.

5 I wanted to convene this call today to discuss the
6 motion that the government has filed as of last night, the
7 motion to dismiss for lack of subject matter jurisdiction,
8 and I have reviewed Mr. Schwartz's letter dated January 11th,
9 2017 in which he objects to the manner in which the
10 government is proceeding and suggests that the government
11 should be held to its agreement or my earlier order providing
12 that what would be filed is an answer, that term is defined
13 under the Federal Rules, rather than a motion to dismiss.

14 And my view of this matter is I am certainly not
15 thrilled to be getting a motion to dismiss for lack of
16 subject matter jurisdiction at this point, it is not what we
17 talked about, it is not what I anticipated, it is not what I
18 understood Mr. Murphy and the government would be focusing
19 on.

20 Nonetheless, it seems to me that the most efficient
21 way to handle this is to take up the jurisdictional point
22 here because if Mr. Murphy is correct this case shouldn't be
23 moving forward. And while I have the discretion to be
24 permitting discovery and letting the case go forward, my
25 inclination is not to do that but to instead quickly get to

1 the heart of this issue and see if there is a basis to permit
2 this case to proceed.

3 But, Mr. Schwartz, I will give you an opportunity
4 to respond. In responding I don't want you to think that I
5 don't share your frustration or that I don't appreciate your
6 frustration or that I don't understand your frustration, I
7 get it, and I certainly understand your desire to move
8 forward and your complaints about the way the government has
9 gone about this. So you don't need to convince me of that,
10 but I will give you an opportunity to address this, so go
11 ahead.

12 MR. SCHWARTZ: Thank you, Your Honor. And for the
13 record, this is Stuart Schwartz speaking for the plaintiffs.

14 I certainly -- you know, we got the motion late
15 last night, we did have an opportunity to briefly go through
16 it. It didn't come as a -- as Your Honor probably knows from
17 some of the correspondence leading up to it, it didn't come
18 as a complete surprise to us. I would note, however, that
19 while I understand now is not the time to argue the motion
20 that this is the same issue that was raised in the prior
21 motion, albeit in a footnote, and that footnote seems to have
22 now expanded into upwards of 19 pages.

23 Be that as it may, Your Honor, the core of this
24 motion was a request from the government to plaintiffs for
25 what I believe to be discovery outside of the pleadings and

1 Mr. Murphy has characterized my response to that as a refusal
2 to provide information. That is not our position. Our
3 position is that this is a discovery matter and that it
4 should be discussed in the context of a Rule 26(f)
5 conference, a mutual 26(f) conference. So if there is
6 information or a particular request that the government is
7 seeking of us, that we would respond to those in due course
8 as provided for under our rules, and we would expect the same
9 ability to do that of the government.

10 I do not see -- understanding Your Honor's
11 preliminary comment, I do not see a reason not to convene
12 that conference or at least allow some limited non-party
13 discovery at this point, namely summonses that would be
14 directed to the banks. Your Honor will probably -- you'll
15 see when you get into the motion, we are still talking about
16 the same issue based on a case from 1999 out of the Southern
17 District of New York. So there is no binding precedent
18 regarding this issue, this would be an issue of first
19 impression, as the government has framed it -- national first
20 impression as the government has framed it.

21 We have been over this ground, and we believe
22 that -- really that this is designed to -- doing this in two
23 steps, it was designed to delay the 26(f) conference and
24 discovery. We have a number of questions, Your Honor, and
25 some of those -- the answers to those questions are going to

1 be found in records provided by banks pursuant to subpoenas.
2 I am not even sure I can answer the government's questions --
3 general questions of me without pursuing that discovery.
4 They may be even in a better position than me to answer some
5 of the questions that were asked, but, nonetheless, these are
6 discovery issues, they really are.

7 And I understand the Court's inclination to deal
8 with the motion in normal course and we can respond in the
9 normal course, but there are discovery issues that bear on --
10 bear on the motion, and I would ask Your Honor to reconsider
11 your initial inclination to hold off on any sort of formal
12 discovery until you dispose of the pending motion, but I
13 don't see any reason to do that --

14 THE COURT: Mr. Schwartz, Mr. Schwartz --

15 MR. SCHWARTZ: -- especially in light of the fact
16 that the government had to ask of discovery from us, which is
17 ironic.

18 I would also just very briefly make the point, Your
19 Honor, one of the government's objections to convening this
20 Rule 26(f) conference is that discovery in their view is
21 going to be burdensome. Well, Your Honor may recall that
22 Mr. Murphy made some pretty explicit representations to the
23 Court regarding these summons, that there were only two --
24 and I'm paraphrasing, but basically only two of these
25 summonses and this was an isolated incident. So presumably

1 they have already done some modicum of review that would put
2 them in a position to make those representations to the
3 Court, and if that is the case then I'm not sure how
4 burdensome party discovery would be on them.

5 Moreover, I don't see how non-party discovery would
6 occasion any burden on the government. So I -- and I
7 apologize for speaking over Your Honor briefly there, but
8 that is our position that we should move forward at least in
9 some limited fashion with discovery at this point.

10 THE COURT: Mr. Schwartz, let me ask the question
11 that Mr. Murphy asked. With respect to the account that in
12 the amended complaint is identified as belonging to, quote,
13 the Miller plaintiffs, is that account in the name of
14 Terry Miller individually and an L.L.C. or is it solely in
15 the name of the L.L.C.?

16 MR. SCHWARTZ: I don't know the answer to that
17 question right now. I would have -- I would be prepared to
18 get an answer to that, like I said, in the context of a 26(f)
19 conference, but nevertheless, I think it is even more nuanced
20 than that with respect to the Miller plaintiff and She Got
21 Busted By Me, which is not -- as I understand it has not made
22 any annual filings with the state for at least some of the
23 relevant time period.

24 So there are some nuanced issues here, obviously we
25 will be addressing those in the context of the motion, but,

1 again, even accepting everything that the government says as
2 true in their motion, they are still relying on one case that
3 has no precedential value from nearly 18 years ago --

4 THE COURT: Look, Mr. Schwartz, there is a simple
5 answer here and there is a hard answer. The simple answer is
6 if you can plead in good faith that the account in question
7 or one of the accounts was in the name of Terry Miller,
8 individually, you will, it seems to me, unless I'm missing
9 something, moot this motion and you can have at it in
10 discovery. So, I mean, if you can't make that allegation,
11 then even though he is relying, as you say, on a single case
12 on point, he's certainly supported the argument with cases
13 that are similar and relevant and he's raised an argument
14 that without an allegation of -- that it belongs to
15 Terry Miller personally, his argument is one that I think
16 does need to be addressed so I can determine if I have
17 jurisdiction.

18 So are you in a position now where you can allege
19 that that account was either in the name of Terry Miller,
20 individually, or at least that Terry Miller's name was on it?

21 MR. SCHWARTZ: I will have to double check that,
22 Your Honor, as far as -- although, respectfully, it is -- and
23 I can address that specific issue, but there are other
24 related issues because we don't know that accounts -- the
25 actual records that were produced in response to the summons,

1 that the government in its latest motion has acknowledged
2 having received and, unbelievably to me, stated that they
3 destroyed. So the only way that I can recreate -- hope --
4 potentially recreate at this point based on the government's
5 revelation that they destroyed these records is by going to
6 Chase Bank and asking for the records that were obtained by
7 the government in response to the summons.

8 THE COURT: I'm having trouble following that
9 argument. Isn't the -- the government served a summons for a
10 particularly identified account; is that correct?

11 MR. SCHWARTZ: I believe so.

12 THE COURT: All right.

13 MR. SCHWARTZ: However, what was produced in
14 response and what the government actually obtained may be
15 different than the account that was -- than the specific
16 account number that was referenced. I mean, banks do have
17 occasion to provide different information than specifically
18 provided in the identifier and we are also talking about I
19 believe upwards of eight years of bank records.

20 THE COURT: All right. Well, it is not clear to me
21 that if the bank produced the wrong records, records not
22 sought by the government, that that would subject them to
23 liability, but here is what I would ask you to do. It seems
24 to me it is a fairly straightforward inquiry, one that
25 doesn't require discovery tools to ask your own clients

1 whether Terry Miller individually was on that account, and if
2 Terry Miller doesn't recall, then to have your clients go to
3 their own bank and ask whether Terry Miller is on the
4 account.

5 If Terry Miller is on the account, I will permit
6 you to file an amended complaint that specifically alleges
7 that, that will get us past the bulk of Mr. Murphy's motion,
8 certainly the part that contests my subject matter
9 jurisdiction, and then we can dive into discovery.

10 If you cannot make that specific allegation, then
11 what I want to do is take up the motion, figure out if I have
12 subject matter jurisdiction, and if I do then we will -- then
13 I will allow discovery. If I don't, I will, of course,
14 dismiss the case.

15 How long do you need to figure out whether you can
16 make that allegation or not?

17 MR. SCHWARTZ: Actually, Brent, are you on the
18 phone? Can you hear, Brent?

19 MR. LEDER: Yes.

20 MR. SCHWARTZ: Your Honor, I would need a little
21 bit of input from Mr. Leder on that.

22 MR. LEDER: I would say safely -- I'm on the eighth
23 floor, I apologize. I am -- about two weeks.

24 THE COURT: Two weeks? Okay. By not later than
25 February 1st will you, Mr. Schwartz, let Ms. Monda know

1 whether you will be filing an amended complaint with this
2 allegation in it or whether you will be responding to the
3 motion, those are the two options that I'm allowing now?

4 If you need to respond to the motion I will give
5 you another three weeks from February 1st, so you don't have
6 to be doing two things at once until February 22nd, and if
7 you end up needing more time after that that would be fine
8 with me as well, just let us know.

9 Also, if the course of action here is going to be
10 not to file a complaint that adds the allegation of
11 individual ownership -- individual ownership by Terry Miller,
12 I would ask that you file on the docket a clean copy of the
13 amended complaint that was attached as a red line to one of
14 your earlier filings so that we have a clean copy on the
15 docket that we can all refer to.

16 In the clean copy please omit the claims that I
17 dismissed, and you can -- or you can include them and somehow
18 indicate on them dismissed by prior order of the Court so you
19 are not waiving your right to assert them, but if you don't
20 file a new complaint with the individual ownership allegation
21 what I want is a copy in the record on the docket of what is
22 the currently operative complaint. So we will look to hear
23 from you within two weeks.

24 Mr. Murphy, I want to just direct a couple comments
25 here. I have taken a course of action that I -- that I

1 believe is consistent with what the government wants me to
2 do, but I want to emphasis what I indicated to Mr. Schwartz,
3 I don't think the government handled this in the way that I
4 would have hoped. I think that this issue should have been
5 presented a long time ago, not in a footnote to a motion to
6 dismiss. 6th Circuit law is clear, you can't present
7 arguments or claims in a footnote. The government should
8 know that to practice in this Court. There has been foot
9 dragging, and if I have subject matter jurisdiction in this
10 case I am going to hold the government to prompt discovery
11 and I'm going to let the plaintiffs take a hard look at this
12 conduct.

13 So I don't want you to confuse my view of what I
14 have to do in order to confirm that I have subject matter
15 jurisdiction with any opinion on my part that I think this
16 has been handled appropriately. Thank you. That's all I
17 have. Good-bye.

18 (Proceedings concluded at 1:50 p.m.)
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1 CERTIFICATION

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3 I, Robert L. Smith, Official Court Reporter of
4 the United States District Court, Eastern District of
5 Michigan, appointed pursuant to the provisions of Title 28,
6 United States Code, Section 753, do hereby certify that the
7 foregoing pages comprise a full, true and correct transcript
8 taken in the matter of Hohman, et al., vs. USA, et al., Case
9 No. 16-11429, on Wednesday, January 18, 2017.

10
11
12 s/Robert L. Smith

13 Robert L. Smith, RPR, CSR 5098
14 Federal Official Court Reporter
United States District Court
Eastern District of Michigan

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17 Date: 01/24/2017

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